

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-33528

KEN CURTIS  
APRIL CURTIS

Debtors

KARINA E. CURTIS

Plaintiff

v.

Adv. Proc. No. 02-3179

KEN CURTIS  
APRIL CURTIS

Defendants

**MEMORANDUM**

**APPEARANCES:** KARINA E. CURTIS  
1931 Plumb Creek Circle  
Knoxville, Tennessee 37932  
*Pro se* Plaintiff

GAIL F. WORTLEY, ESQ.  
3715 Powers Street  
Knoxville, Tennessee 37917  
Attorney for Defendants/Debtors

**RICHARD STAIR, JR.**  
**UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff, Karina E. Curtis, *pro se*, seeking a determination that certain marital obligations imposed upon the Defendant, Ken Curtis,<sup>1</sup> under the terms of a Marital Dissolution Agreement and a Final Decree of Divorce, are nondischargeable under 11 U.S.C.A. § 523(a)(15) (West 1993 & Supp. 2003).<sup>2</sup> The Defendant seeks a determination that the marital debts are dischargeable, maintaining that he does not have the present financial ability to pay the obligations.

The trial of this adversary proceeding was held on April 22, 2003. The record before the court consists of two stipulated exhibits appended to the December 26, 2002 pretrial Order, seven exhibits introduced into evidence, and the testimony of the Plaintiff and the Defendant.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(I) (West 1993).

## I

The Plaintiff was granted an absolute divorce from the Defendant on November 29, 2001, by virtue of a Final Decree of Divorce (the Final Decree) entered in the Chancery Court for Knox County, Tennessee. The Final Decree incorporated into its terms a Marital Dissolution Agreement filed with the Chancery Court on November 2, 2001, and provides, in pertinent part, for the payment of various marital obligations by each party:

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<sup>1</sup> The court will refer to Ken Curtis throughout this Memorandum as the "Defendant." References to both Defendants will be to the "Debtors."

<sup>2</sup> The Plaintiff filed her Complaint against both Debtors; however, she conceded at trial that her action was only against Ken Curtis and not April Curtis. Accordingly, the Complaint against April Curtis shall be dismissed.

6. Mother [the Plaintiff] shall be solely responsible for the indebtedness on the Providian VISA account. Father [the Defendant] shall be solely responsible for the ORNL [Federal] Credit Union VISA account, the ORNL [Federal] Credit Union personal loan, both MBNA VISA accounts, and the loan on his 401k account [(the Marital Obligations)]. Each party will be solely responsible for any other indebtedness in their respective individual names.

7. In connection with any indebtedness assumed solely by either of the parties pursuant to this decree, the party assuming such indebtedness shall indemnify and hold the other party harmless from and against any and all claims, demands, liabilities, judgments, costs and/or expenses with regard thereto.

Pursuant to evidence introduced at trial, the balance on the ORNL Federal Credit Union personal loan account, number 0001329860, is \$6,838.18, plus 11% interest per annum, with monthly payments owing of \$46.85, and the balance on the ORNL Federal Credit Union Visa account, number 4656 2956 8011 9103, is \$4,876.65, plus 18% interest per annum, with monthly payments owing of \$147.00.<sup>3</sup> See TRIAL EX. 1; TRIAL EX. 2.

The Debtors filed the voluntary petition initiating their underlying Chapter 7 bankruptcy case on July 8, 2002. The Marital Obligations were listed in the Debtors' statements and schedules as nonpriority unsecured debts, and the Defendant seeks a discharge of his liability thereon. The Plaintiff filed her Complaint initiating this adversary proceeding on October 4, 2002.

In her Complaint, the Plaintiff asserts that the Marital Obligations imposed under the Final Decree fall within the scope of § 523(a)(15) and are nondischargeable. She asserts that the Defendant has the ability to pay these debts but that he is simply choosing not to do so. The Defendant argues that the Marital Obligations are dischargeable because he does not have the

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<sup>3</sup> The MBNA Visa accounts and the Defendant's loan from his 401(k) account have apparently been resolved and are not in dispute.

ability to pay the debts, meeting the requirements of the affirmative defense found within § 523(a)(15)(A).

## II

Nondischargeability of debts is governed by 11 U.S.C.A. § 523, which provides, in pertinent part:

(a) A discharge under section 727,<sup>4</sup> . . . of this title does not discharge an individual debtor from any debt—

. . . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor[.]

11 U.S.C.A. § 523(a) (West 1993 & Supp. 2003). The party seeking a determination of nondischargeability under § 523(a) bears the burden of proof by a preponderance of the evidence.

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<sup>4</sup> All debts of a Chapter 7 debtor arising pre-petition are discharged, “[e]xcept as provided in section 523 of this title . . . .” 11 U.S.C.A. § 727(b) (West 1993). The purpose of Chapter 7 is to relieve the “honest but unfortunate debtor” of his indebtedness, allowing him to make a “fresh start” through discharge of pre-petition debts. *In re Krohn*, 886 F.2d 123, 125 (6<sup>th</sup> Cir. 1989) (citing *Local Loan Co. v. Hunt*, 54 S. Ct. 695, 699 (1934)).

*Grogan v. Garner*, 111 S. Ct. 654, 661 (1991). The provisions of § 523(a) are strictly construed against the creditor. *Spiezio v. Vitek (In re Vitek)*, 271 B.R. 551, 559 (Bankr. S.D. Ohio 2001).

Under § 523(a)(15), the non-debtor spouse must first prove that the debt is not of the kind described in § 523(a)(5)<sup>5</sup> and that it was incurred in the course of a divorce. See 11 U.S.C.A. § 523(a)(15); *Crawford v. Osborne (In re Osborne)*, 262 B.R. 435, 439 (Bankr. E.D. Tenn. 2001). Once met, the burden shifts to the Defendant to prove “one of the affirmative defenses set forth in § 523(a)(15)(A) or (B).” *Osborne*, 262 B.R. at 439; see also *In re Crosswhite*, 148 F.3d 879, 886 (7<sup>th</sup> Cir. 1998).<sup>6</sup> The Defendant’s burden of proof is likewise by a preponderance of the evidence. *Hart v. Molino (In re Molino)*, 225 B.R. 904, 907 (B.A.P. 6<sup>th</sup> Cir. 1998).

In this case, the parties do not dispute that the obligations in question fall within the definition of § 523(a)(15) as having been “incurred by the debtor in the course of a divorce . . . or in connection with a . . . divorce decree . . . .” 11 U.S.C.A. § 523(a)(15). Thus, the burden of proof shifted to the Defendant to prove either an inability to pay the debt or that discharge of the debt would result in a benefit to him outweighing any detrimental effect to the Plaintiff if the debt is discharged.

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<sup>5</sup> Section 523(a)(5) concerns awards of maintenance, alimony, or child support incurred in the course of a divorce.

<sup>6</sup> At trial, the Defendant erroneously argued that the Plaintiff “had not proved her case.” The Defendant bears the burden of proof.

### III

Section 523(a)(15)(A) requires that the court determine whether the Defendant has any disposable income left over each month, after paying all expenses that are reasonably necessary to support himself and his dependents, that can be used to pay the Marital Obligations. See § 523(a)(15)(A); *Calabrese v. Calabrese (In re Calabrese)*, 277 B.R. 357, 361 (Bankr. N.D. Ohio 2002). He has the ability to pay under this section if he “has sufficient disposable income to pay all or a material part of a debt within a reasonable amount of time.” *Osborne*, 262 B.R. at 444 (quoting *Armstrong v. Armstrong (In re Armstrong)*, 205 B.R. 386, 392 (Bankr. W.D. Tenn. 1996)). The Defendant must show that he is unable to pay both presently and in the future. *Molino*, 225 B.R. at 908. The court should consider the Defendant’s present income and prospective earning capacity as of the date of trial. *Osborne*, 262 B.R. at 443. In ascertaining future earning potential, the court may look to “a debtor’s prior employment, future employment opportunities, and health status.” *Molino*, 225 B.R. at 908. The following factors may also be considered in the court’s determination of a debtor’s ability to pay:

1. The debtor's “disposable income” as measured at the time of trial;<sup>7</sup>
2. The presence of more lucrative employment opportunities which might enable the debtor fully to satisfy his divorce-related obligation;
3. The extent to which the debtor's burden of debt will be lessened in the near term;

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<sup>7</sup> For the purposes of this section, disposable income can be defined as “that income which is received by the debtor and which is not reasonably necessary to be expended for the support or maintenance of the debtor or for a dependent of the debtor.” *Erd v. Erd (In re Erd)*, 282 B.R. 620, 625 (Bankr. N.D. Ohio 2002); see also *Crossett v. Windom (In re Windom)*, 207 B.R. 1017, 1021 (Bankr. W.D. Tenn. 1997) (because the language is almost identical, the appropriate standard for determining a debtor’s ability to pay is the “disposable income test” set forth in 11 U.S.C.A. § 1325(b)(2) (West 1993 & Supp. 2003)).

4. The extent to which the debtor previously has made a good faith effort toward satisfying the debt in question;
5. The amount of the debts which a creditor is seeking to have held nondischargeable and the repayment terms and condition of those debts;
6. The value and nature of any property the debtor retained after his bankruptcy filing;
7. The amount of reasonable and necessary expenses which the debtor must incur for the support of the debtor, the debtor's dependents and the continuation, preservation and operation of the debtor's business, if any;
8. The income of debtor's new spouse as such income should be included in the calculation of the debtor's disposable income;
9. Any evidence of probable changes in the debtor's expenses.

*Crossett v. Windom (In re Windom)*, 207 B.R. 1017, 1021-22 (Bankr. W.D. Tenn. 1997).

Additionally, if the debtor "artificially diminishes his ability to repay obligations addressable under § 523(a)(15), such conduct becomes a factor appropriately considered by the bankruptcy court in a § 523(a)(15) proceeding." *Molino*, 225 B.R. at 908. Likewise, a debtor's monthly expenses should be considered. See *Sacher v. Gengler (In re Gengler)*, 278 B.R. 146, 151 (Bankr. N.D. Ohio 2002); *Calabrese*, 277 B.R. at 361-62. The court "is not required to accept, at face value, a debtor's itemized expense, but is rather under a duty to scrutinize a debtor's expenses so as to ensure that such expenses are reasonable." *Gengler*, 278 B.R. at 151. "Reasonably necessary expenses are those that are adequate, not first class or luxury items." *Hammermeister v. Hammermeister (In re Hammermeister)*, 270 B.R. 863, 877 (Bankr. S.D. Ohio 2001). Along those lines, "although not expected to live in poverty, [debtors are] expected to tighten their financial belt, and thus do without many amenities to which they may have otherwise

become accustomed.” *Courtney v. Traut (In re Traut)*, 282 B.R. 863, 869 (Bankr. N.D. Ohio 2002). Accordingly, the court must also ascertain whether the Defendant’s expenses are either unreasonable or unnecessary.

Finally, if the court finds that the Defendant does have an ability to pay, it must then determine if he can realistically pay the Marital Obligations within a reasonable time. See § 523(a)(15)(A); *Gengler*, 278 B.R. at 150-51 (citing *Miller v. Miller (In re Miller)*, 247 B.R. 412, 415 (Bankr. N.D. Ohio 2000)). There are no guidelines in the Bankruptcy Code for determining what constitutes a reasonable time, but other courts have found that repayment of debts ranging from five to eight years fits the requirement. See, e.g., *Erd v. Erd (In re Erd)*, 282 B.R. 620, 626-27 (Bankr. N.D. Ohio 2002) (five years was a reasonable time to repay approximately \$7,000.00); *Gengler*, 278 B.R. at 152 (six years was a reasonable time to repay approximately \$21,000.00); *Cox v. Brodeur (In re Brodeur)*, 276 B.R. 827, 835 (Bankr. N.D. Ohio 2001) (more than eight years was a reasonable time to repay approximately \$22,000.00); *Pino v. Pino (In re Pino)*, 268 B.R. 483, 501 (Bankr. W.D. Tex. 2001) (five years was a reasonable time to repay approximately \$20,000.00); *Koenig v. Koenig (In re Koenig)*, 265 B.R. 772, 776 (Bankr. N.D. Ohio 2001) (eight and one-half years was a reasonable time to repay approximately \$51,000.00); *Oswald v. Asbill (In re Asbill)*, 236 B.R. 192, 196-97 (Bankr. D.S.C. 1999) (period of three to five years was a reasonable time to repay \$5,000.00).

Here, the Debtors introduced into evidence as Trial Exhibit 6 a statement of their monthly income and expenses, set forth as follows:

INCOME - take home per month

Ken Curtis	\$2,255.00
April Curtis	\$3,074.00
April Curtis child support	\$ 250.02
 TOTAL	 \$5,579.02

MONTHLY EXPENSES

Lease	\$ 900.00
Ford Ranger	\$ 228.00
Clothing	\$ 175.00
Utilities	\$ 400.00
Telephone	\$ 80.00
Cell Phone	\$ 75.00
Gas	\$ 200.00
Groceries	\$ 750.00
Recreation	\$ 100.00
Cable	\$ 92.00
School breakfast & lunch (children)	\$ 120.00
Medical expenses	\$ 200.00
Auto insurance	\$ 350.00
Child support	\$1,026.00
Attorney fees - Ken Curtis	\$ 300.00
Child care	\$ 520.00
Attorney fees - April Curtis	\$ 100.00
 TOTAL	 \$5,616.00

TRIAL EX. 6.

The Defendant also introduced into evidence paycheck stubs for himself and his wife for the week beginning February 10, 2003, and ending February 16, 2003. See TRIAL EX. 4 (Check Stub for April Curtis); TRIAL EX. 5 (Check Stub for Ken Curtis). According to these paycheck stubs, which the Defendant testified were accurate representations of the weekly earnings for his household, the breakdown of the Defendant's pay is as follows:

Total gross salary (40 hours/week)	\$954.00
Less: Withholding taxes	\$98.94
Social Security	\$56.68
Medicare	\$13.25
General loan	\$27.78 <sup>8</sup>
Cigna (insurance)	\$39.70
Basic life	\$ 4.42
Supp. life insurance	\$ 1.25
Spec. Acc.	\$ 1.31
Post. tax child	\$ 0.25
Post tax spouse	\$ 0.91
Net pay	\$709.51

TRIAL EX. 5. The Defendant's weekly net earnings of \$709.51 translates to \$3,074.00 per month.<sup>9</sup>

The Debtor has been employed by the same company, UT-Battelle, for approximately ten years. He offered no evidence to reflect a decrease in his base salary reflected on Trial Exhibit 5. When questioned about the ability to work overtime, the Defendant stated that he does not expect to work any appreciable amount of overtime, estimating a total of less than fifty hours. The Defendant also testified that he has turned down the opportunity to work overtime in the past.

The breakdown of April Curtis's weekly pay is as follows:

Total gross salary (40 hours/week)	\$816.00
Less: Withholding taxes	\$ 76.85
Social Security	\$ 50.59
Medicare	\$ 11.84

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<sup>8</sup> This is presumably the Defendant's reimbursement of the 401(k) loan included in the Final Decree. Although the Chapter 7 Individual Debtor's Statement of Intention filed with the Debtors' Voluntary Petition (TRIAL EX. 3) evidences the Defendant's intention to reaffirm the 401(k) debt to State Street Bank, the court takes judicial notice that no reaffirmation agreement was filed in the Debtors' case prior to the granting of their discharge on October 24, 2002, as is required by 11 U.S.C.A. § 524(c) (West 1993 & Supp. 2003). These payments are therefore being made voluntarily by the Defendant.

<sup>9</sup> The Defendant's weekly pay multiplied by 52 weeks, then divided by twelve months.

Credit Union	\$100.00 <sup>10</sup>
Basic life (insurance)	\$ 3.80
Supp. life insurance	\$ 2.63
Spec. Acc.	\$ 0.68
Basic 401(k) Sav.	\$ 48.96
Net pay	\$520.65

TRIAL EX. 4. Using the same manner of calculation as with the Defendant, Mrs. Curtis's weekly net earnings of \$520.65 translates to \$2,256.15 per month.<sup>11</sup>

On its face, Trial Exhibit 6 seems to indicate that the Defendant does not have the ability to pay the Marital Obligations. According to this exhibit, the Debtors' combined monthly income of \$5,579.02 does not cover their monthly expenses of \$5,616.00, instead leaving a deficit of \$36.98 per month. However, using the guidelines set forth in *Molino*, the court is required to "dig deeper." Following that lead, the court questions the amounts listed for some of the Debtors' expenses as well as the actual necessity of others.

First, on April 15, 2003, the Debtors filed Defendants' Trial Brief (the Trial Brief) to which an Exhibit 6 was attached, detailing their monthly income and expenses. The exhibit attached to the Trial Brief reflected the following information:

INCOME - take home per month

Ken Curtis	\$2,255.00
April Curtis	\$3,074.00
TOTAL	\$5,329.00

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<sup>10</sup> According to Trial Exhibit 4, the week ending February 16, 2003, was the first week that this amount was deducted from this Debtor's paycheck.

<sup>11</sup> The court takes judicial notice that Trial Exhibit 6 has the Debtors' monthly income transposed, and that, in fact, it is the Debtor, and not April Curtis, who earns more than \$3,000.00 per month.

### MONTHLY EXPENSES

Mortgage payment	\$ 680.00
Lease	\$ 900.00
Ford Ranger	\$ 228.00
Clothing	\$ 175.00
Utilities	\$ 400.00
Telephone	\$ 80.00
Cell Phone	\$ 75.00
Gas	\$ 200.00
Groceries	\$ 750.00
Recreation	\$ 100.00
Cable	\$ 92.00
School breakfast & lunch (children)	\$ 342.00
Medical expenses	\$ 200.00
Auto insurance	\$ 350.00
Child support	\$1,026.00
 TOTAL	 \$5,598.00

TRIAL BRIEF EX. 6.

When questioned at trial about the dual expenses of a \$680.00 mortgage payment in addition to rent of \$900.00 referenced on the Trial Brief Exhibit 6, the Defendant explained that his family had been living in a house in Oak Ridge, Tennessee, but that they needed a bigger house, so they moved to their current residence in Clinton, Tennessee, which they are leasing. The Defendant also testified that the Debtors have been unsuccessful in their attempts to sell the house in Oak Ridge and, instead, they have recently leased it for \$700.00 per month in rent. The Defendant explained that the income and expense statement entered into evidence as Trial Exhibit 6 reflected the lease of the home; however, he did not explain other significant changes in the Debtors' expenses reflected on Trial Exhibit 6, such as the new listings for attorneys' fees totaling

\$400.00 per month and the child care expense of \$520.00, as well as a sudden decrease in the expenses for school breakfasts and lunches.

Several things about these disparate statements of expenses and income are troublesome to the court, the first of which is the Defendant's acknowledgment that the Debtors were required to pay approximately \$4,000.00 to move into the leased house in Clinton. When asked where they got the funds to pay this amount, the Defendant testified that he had borrowed it from his parents. This sum would have paid off almost the entire credit card balance owed. *Cf. Traut*, 282 B.R. at 870 ([I]t is observed that according to the specific statutory language of § 523(a)(15)(A), any analysis conducted thereunder, in addition to looking to the Debtor's income, must also take into consideration the amount of property that the debtor had available to pay the marital debt.").

Additionally, the statement submitted as Trial Exhibit 6 shows child support income for April Curtis of \$250.02, in addition to deleting the mortgage expense of \$680.00 and reducing the expense for school breakfasts and lunches for their children from \$342.00 to \$120.00, resulting in a net increase in the Debtors' monthly income of \$1,152.02. And yet, the expenses shown on Trial Exhibit 6 are \$18.00 greater than those shown on the Trial Brief Exhibit 6, filed on April 15, 2003, only one week prior to trial, because the Debtors added expenses for attorneys' fees and child care totaling \$920.00. The Defendant offered no explanation as to why the expense for the school meals decreased by \$222.00 in one week, nor did he explain how the Debtors neglected to list child care expenses in their Trial Brief Exhibit 6.<sup>12</sup> Moreover, the Defendant did not fully

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<sup>12</sup> Likewise, the court notes that many of the Debtors' expenses listed on both Trial Brief Exhibit 6 and Trial Exhibit 6 vary from the amounts listed for expenses on the Debtors' Schedule J filed on July 8, 2002, as does their income (continued...)

explain the entries for \$400.00 in attorneys' fees each month that were not expenses one week earlier; instead, testifying simply that he and the Plaintiff have an ongoing legal proceeding in state court regarding issues with their children, without further explanation, and testifying that April Curtis and her former spouse were beginning a custody battle in the near future.

Second, and of equal importance, some of the expenses listed by the Debtors on their Trial Exhibit 6 are not, in the court's opinion, "reasonably necessary to be expended for the maintenance or support" of the Defendant and his dependents, especially in light of the differing statements of expenses submitted by the Debtors and discussed above. For instance, the Debtors list an expense of \$75.00 per month for cellular phone service. Cellular telephones are not generally considered a necessity, especially for Chapter 7 Debtors who also incur a home telephone bill of \$80.00 per month, which obviously includes long-distance service. Along those lines, the court also questions the necessity of a \$92.00 monthly cable bill. Generally, monthly expenses for basic cable are no more than \$50.00 per month. The court does not believe that premium cable services or channels constitute a necessary expense.

Also, the court has serious questions regarding some of the Debtors' payroll deductions. First, Trial Exhibit 5 evidences that the Defendant has \$1.31 being paid into a "special account" which has a year to date balance of \$10.48. See TRIAL EX. 5. Even though this is a small amount per week, and it yields a small yearly total of \$68.12, at trial, the Defendant testified that his family has only one bank account at the Y-12 credit union and "no others." However, it appears that

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<sup>12</sup>(...continued)  
shown on Schedule I.

there is at least one other account, this "special account" with an unknown balance. Similarly, Trial Exhibit 4 shows that April Curtis has a deduction of \$.58 per week also being paid into a "special account" in addition to weekly deductions of \$48.96 towards a 401(k) and \$100.00 towards a credit union. See TRIAL EX. 4. Seeing that she did not indicate on her Statement of Intentions, submitted into evidence as Trial Exhibit 3, any intention to reaffirm any debt to any credit union, the court presumes that this deduction is funding a savings account \$433.33 per month.<sup>13</sup> See TRIAL EX. 3. The court also finds it curious that the "year to date" totals on her paycheck stub indicate that this deduction began with her paycheck for the week ending February 16, 2003. It is not simply the amounts of these deductions into the various accounts that the court finds disturbing, but rather, it is the Defendant's testimony that the family only maintains one bank account.

Additionally, the amounts listed for several expenses seem to be overstated. For example, a utility expense of \$400.00 for a single-family residence seems unusually high, especially when during the day, the children are either in school or childcare and the adults are at work.<sup>14</sup> Similarly, although not completely unrealistic, the Debtors' estimated \$200.00 per month in medical expenses translates to approximately \$400.00 per household member per year;<sup>15</sup> however, the Defendant offered no evidence that any member of his family had serious health problems to

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<sup>13</sup> The court multiplied \$100.00 per week by 52 weeks, for a total of \$5,200.00, divided by twelve months.

<sup>14</sup> At trial, the Defendant stated that approximately \$30.00 of the \$400.00 utility expense covered utilities at the Oak Ridge house, which the Debtors will no longer be paying since they have leased the house.

<sup>15</sup> To obtain this figure, the court multiplied the claimed \$200.00 monthly expense by twelve months, for a yearly total of \$2,400.00, then divided by six persons, which represents each of the Debtors, the three children living with the Debtors, and one of the Defendant's children (based upon the Defendant's testimony that he pays one-half of the medical expenses for his two children).

necessitate such a high medical expense. Also, the Debtors' \$750.00 grocery expense translates to \$173.07 per week,<sup>16</sup> and does not include the \$40.00 per week<sup>17</sup> separately listed expense for school meals of both breakfast and lunch. Finally, the court does not question the necessity of the Debtors' automobile insurance; however, the court has questions about the \$350.00 amount listed therefor. This translates to \$4,200.00 per year on automobile insurance, which seems to be extremely high for a family in which there are no minor drivers.

Based upon the foregoing, the court finds that the Defendant has a present and future ability to pay the approximately \$11,000.00 owed on the Marital Obligations within a reasonable time. The expenses for cellular telephone service and premium cable totaling \$117.00 are not necessary for the purposes of § 523(a)(15)(A). Also, the Debtors' utility expense has, according to the Defendant's testimony, decreased by approximately \$30.00 per month since their Oak Ridge house was rented. As such, the Defendant has at least \$147.00 per month of disposable income. This amount does not include the small amount of money being paid into at least one "special account" by the Debtors, nor does it include the \$100.00 per week being deducted from April Curtis's paycheck into a credit union account. Additionally, the court believes that the Debtors have overstated several of their monthly expenses, and the court questions the Defendant's credibility as to expenses that were conveniently remembered in time for trial after the Debtors' income and expenses increased by more than \$1,100.00 between April 15 and April 22 by the lease of their home and other factors. The court finds that if the Defendant applied even the minimum monthly

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<sup>16</sup> The court multiplied \$750.00 times twelve months, for a total of \$9,000.00 per year, then divided by 52 weeks.

<sup>17</sup> The court determined this figure by multiplying \$120.00 per month times twelve months, for a total of \$1,440.00 per year, then dividing by a 36-week school year.

payments on each account totaling \$193.85 per month towards the Marital Obligations, he could pay both accounts in full within a reasonable time.<sup>18</sup> Because the Defendant has not met his burden of proof that he does not have the ability to pay the Marital Obligations within a reasonable time, the court will consider the balancing test of § 523(a)(15)(B).<sup>19</sup>

#### IV

Even if the Defendant has the ability to pay, § 523(a)(15)(B) allows the Marital Obligations to be discharged upon a showing that the benefit to the Defendant of discharging the debt outweighs any detriment to the Plaintiff if the debt is not discharged. The bankruptcy court should compare the financial condition and standard of living of each party to “determine the true benefit of the debtor’s possible discharge against any hardship the former spouse . . . would suffer as a result of a discharge.” *Osborne*, 262 B.R. at 444 (quoting *Patterson v. Patterson (In re Patterson)*, 132 F.3d 33, 1997 WL 745501, at \*3 (6<sup>th</sup> Cir. Nov. 24, 1997)); see also *Traut*, 282 B.R. at 870-71 (utilizing the standard of living test). In essence,

[i]f, after making this analysis, the debtor’s standard of living will be greater than or approximately equal to the creditor’s if the debt is not discharged, then the debt should be nondischargeable under the [§] 523(a)(15)(B) test. However, if the debtor’s standard of living will fall materially below the creditor’s standard of living if the debt is not discharged, then the debt should be discharged[.]

*In re Smither*, 194 B.R. 102, 111 (Bankr. W.D. Ky. 1996).

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<sup>18</sup> By making payments of \$193.85 per month, the Defendant would be able to repay the Marital Obligations in approximately seven years, which time is within the range that has been determined by courts both within and outside the Sixth Circuit, to be reasonable. Additionally, these Marital Obligations could be paid in full sooner if the Defendant paid more each month and/or applied any tax refunds to the balances.

<sup>19</sup> The Defendant did not expressly request a determination under § 523(a)(15)(B); however, the court believes that it is nevertheless appropriate to also consider the affirmative defense under this section.

The balancing test should be applied on a case-by-case basis, and the Sixth Circuit has adopted a list of factors to be considered by the bankruptcy court in making the comparison:

1. The amount of debt involved, including all payment terms;
2. The current income of the debtor, objecting creditor and their respective spouses;
3. The current expenses of the debtor, objecting creditor and their respective spouses;
4. The current assets, including exempt assets of the debtor, objecting creditor and their respective spouses;
5. The current liabilities, excluding those discharged by the debtor's bankruptcy, of the debtor, objecting creditor and their respective spouses;
6. The health, job skills, training, age and education of the debtor, objecting creditor and their respective spouses;
7. The dependents of the debtor, objecting creditor and their respective spouses, their ages and any special needs which they may have;
8. Any changes in the financial conditions of the debtor and the objecting creditor which may have occurred since the entry of the divorce decree;
9. The amount of debt which has been or will be discharged in the debtor's bankruptcy;
10. Whether the objecting creditor is eligible for relief under the Bankruptcy Code; and
11. Whether the parties have acted in good faith in the filing of the bankruptcy and the litigation of the 11 U.S.C. § 523(a)(15) issues.

*Molino*, 225 B.R. at 909 (quoting *Smither*, 194 B.R. at 111). Because this list is non-exhaustive, the court may entertain any or all of these factors in making its determination, as well as others such as whether the parties have incurred expenses for luxury goods and/or unnecessary services. See, e.g., *Traut*, 282 B.R. at 871. With regards to the aforementioned factors, the Defendant had

the burden of proof that the discharge of the debt would provide him a benefit that outweighs any detriment that discharge would cause to the Plaintiff.<sup>20</sup>

The Marital Obligations to be paid by the Defendant pursuant to the terms of the Final Decree have an outstanding balance of approximately \$11,714.83 as of the date of trial, plus interest.<sup>21</sup> They are payoffs on a personal loan account and a credit card account, both incurred while the Plaintiff and the Defendant were married. As previously stated, the minimum monthly payment on the loan account appears to be \$46.85 per month, accruing interest at a rate of 11% per annum, while the minimum monthly payment on the credit card account appears to be \$147.00, accruing interest at 18% per annum. See TRIAL EX. 1; TRIAL EX. 2.

A determination of benefit versus detriment requires the court to make a comparison of the current income, expenses, assets, and liabilities of the parties. As already discussed in detail above, the Defendant is employed by UT-Battelle and has a net income of \$3,074.00 per month, which is supplemented by April Curtis's income in the amount of \$2,255.00 per month. Their monthly expenses, as listed, total \$5,616.00. Also important in the equation is the fact that the Debtors discharged approximately \$104,560.00 in unsecured debt on October 24, 2002.<sup>22</sup>

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<sup>20</sup> The Defendant did not present a great deal of proof that lends itself to an analysis under § 523(a)(15)(B). Accordingly, the court will only examine those factors for which proof was introduced.

<sup>21</sup> Trial Exhibit 1, a Chargeoff Transaction Summary, shows a balance of \$6,838.18 as of September 14, 2002, and does not include interest from September 14, 2002, forward. See TRIAL EX. 1. Likewise, Trial Exhibit 2 is a credit card statement dated February 19, 2002, that does not include any interest accrued since that date. See TRIAL EX. 2. Accordingly, the total aggregate sum of the Marital Obligations is not limited to the amounts stated on Trial Exhibits 1 and 2. Moreover, the issue of nondischargeability addresses the debt, and not any amounts thereof, such that the amounts would continue to accrue interest as any repayment occurs.

<sup>22</sup> Of this amount, approximately \$102,975.00 was scheduled as credit card and/or loan balances.

On the other side, the Plaintiff is employed by Covenant Health. At trial, she confirmed the accuracy of the monthly income and expenses listed for her on Trial Exhibit 7 submitted into evidence by the Defendant. According to this statement, the Plaintiff's monthly income and expenses are as follows:

#### INCOME

Karina Curtis	\$ 765.00 (2 weeks)
401(k) deduction	\$ 56.18
Monthly income	\$1,779.00
Child support	\$1,026.00
<b>TOTAL</b>	<b>\$2,805.00</b>

#### EXPENSES

Mortgage	\$ 761.00
Rural Metro	\$ 17.00
Home improvement	\$ 98.00
Auto	\$ 285.00
Car/home insurance	\$ 82.00
Credit cards	\$ 122.00
Gym	\$ 40.00
Utilities	\$ 107.00
Water	\$ 55.00
Cable	\$ 55.00
Telephone	\$ 53.00
Gas	\$ 80.00
Auto maintenance	\$ 35.00
Groceries	\$ 800.00
Clothing	\$ 150.00
Medical expenses	\$ 50.00
Recreation	\$ 150.00
School fees	\$ 30.00
<b>TOTAL</b>	<b>\$2,970.00</b>

TRIAL EX. 7. The Plaintiff has not remarried and does not have any additional supplemental income.

Clearly, the Debtors have a higher monthly income than the Plaintiff. They bring home \$2,774.02 more per month than does the Plaintiff. Notwithstanding April Curtis's income, the Defendant by himself nets \$269.00 more per month than the Plaintiff. The Debtors also have higher expenses than does the Plaintiff, by more than \$2,600.00. Their basic expenses can be compared as follows:

	<u>Defendant</u>	<u>Plaintiff</u>
Shelter	\$900.00	\$761.00
Car payment	\$228.00	\$285.00
Clothing	\$175.00	\$150.00
Utilities	\$400.00	\$179.00 <sup>23</sup>
Telephone	\$ 80.00	\$ 53.00
Gas	\$200.00	\$ 80.00
Groceries <sup>24</sup>	\$870.00	\$830.00
Recreation	\$100.00	\$150.00
Cable	\$ 92.00	\$ 55.00
Medical expenses	\$200.00	\$ 50.00
Auto insurance	\$350.00	\$ 82.00 <sup>25</sup>

Additionally, the Debtors list necessary monthly expenses for child support, child care, and attorneys' fees, while the Plaintiff includes on her list of monthly expenses credit card payments, a gym membership, home improvement, and automobile maintenance totaling \$295.00 per month.

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<sup>23</sup> The court has combined the Plaintiff's expenses for utilities, rural metro service, and water.

<sup>24</sup> The court has combined the Debtors' listings for groceries and their children's school breakfasts and lunches. Additionally, the court has combined the Plaintiff's listings for groceries and school expenses.

<sup>25</sup> According to Trial Exhibit 7, this figure for the Plaintiff also includes her home insurance.

Other than the gym membership, however, these expenditures for the Plaintiff can be considered reasonably necessary expenses.<sup>26</sup>

A significant portion of each parties' expenses are attributable to the respective dependents that each household supports. The Debtors support April Curtis's three children, who reside with the Debtors approximately fifty percent of the time. The Defendant's two children reside with the Plaintiff, who works from her home in order to alleviate child care costs. The Defendant enjoys weekly visitation with his children, which includes overnight visits every other week.<sup>27</sup> Additionally, the Defendant maintains that his family moved from the three bedroom house that they owned in Oak Ridge to the four bedroom house that they are leasing in Clinton because they needed another bedroom to accommodate their five children.<sup>28</sup>

The Debtors do not appear to have sacrificed much since the filing of their Chapter 7 bankruptcy case except for their more than \$100,000.00 of unsecured debt. Despite their joint custodial arrangements, the Debtors moved their family from a house that was of sufficient size to a larger home, resulting in an increase of \$220.00 per month in their payment for housing. In addition, they were required to pay \$4,000.00 to secure the house, which amount could have almost paid off the entire credit card portion of the Marital Obligations. On the other hand, the

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<sup>26</sup> The court has already questioned the Debtors' listing of \$750.00 per month in groceries, and similarly, the court is not convinced that the Plaintiff incurs \$800.00 per month in grocery expenses either. However, under the balancing test of § 523(a)(15)(B), these amounts, as stated, are balanced against each other to determine the parties' respective standards of living.

<sup>27</sup> The Defendant gets his children every Wednesday for 4.5 hours, every other weekend from 3:30 p.m. on Friday until 7:00 a.m. on Monday, and every two weeks in the summertime.

<sup>28</sup> On cross examination, however, the Defendant acknowledged that the Oak Ridge home had a study that the family had been utilizing as a bedroom, so in essence, it was a four bedroom house. When the Defendant has his children, they share a bedroom.

Plaintiff testified that she has paid the marital debts that she incurred under the Final Decree, and that after the Debtors filed for bankruptcy, she was contacted by ORNL regarding payment of the two accounts. The Plaintiff testified that she attempted to pay on the accounts and, in fact, that she closed out her children's savings accounts to make the payments in either September or October 2002, but that she has not made any payments since that time because she does not have any extra money. The Plaintiff also stated that her credit has been severely damaged by the Defendant's failure to make these payments.

After balancing the above-referenced factors pertinent to this case, and based upon the testimony at trial, the court finds that any benefit of discharge to the Defendant does not outweigh the detriment to the Plaintiff of being required to repay the Marital Obligations. The Defendant has offered no proof that the benefit to him of discharging the Marital Obligations will outweigh the obvious detriment to the Plaintiff of not discharging them.

## V

In summary, the Defendant has failed to meet his burden of proof as to either § 523(a)(15)(A) or § 523(a)(15)(B). Because the Marital Obligations are not discharged absent proof of one of these affirmative defenses by a preponderance of the evidence, the Marital Obligations incurred by the Defendant under the Final Decree of Divorce entered by the Knox County Chancery Court on November 29, 2001, are nondischargeable.

A judgment consistent with this Memorandum will be entered.

FILED: May 6, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-33528

KEN CURTIS  
APRIL CURTIS

Debtors

KARINA E. CURTIS

Plaintiff

v.

Adv. Proc. No. 02-3179

KEN CURTIS  
APRIL CURTIS

Defendants

**J U D G M E N T**

For the reasons stated in the Memorandum filed this date containing findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure, it is ORDERED, ADJUDGED, and DECREED as follows:

1. The Plaintiff's Complaint filed October 4, 2002, is DISMISSED as to the Defendant April Curtis.
2. The Plaintiff's Complaint is SUSTAINED as to the Defendant Ken Curtis.
3. The obligations imposed on the Defendant Ken Curtis pursuant to the Final Decree of Divorce entered by the Chancery Court for Knox County, Tennessee, on November 29, 2001, in Case No. 146746-3, requiring him to pay the ORNL Federal Credit Union personal loan account,

number 0001329860, and the ORNL Federal Credit Union Visa account, number 4656 2956 8011 9103, are nondischargeable under 11 U.S.C.A. § 523(a)(15) (West 1993 & Supp. 2003).

ENTER: May 6, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE